IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1669

Anthony Fox, Dale Kremsreiter, Michael Schedlbauer, John Luedtke and Martin Detterming, for and in behalf of themselves and other employees similarly situated,
Petitioners,

vs.

General Telephone Company of Wisconsin, a Wisconsin corporation,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

James C. Herrick
BRYNELSON, HERRICK, GEHL & BUCAIDA
Attorneys for Respondent
122 West Washington Avenue
Post Office Box 1767
Madison, Wisconsin 53701

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CLARIFICATION OF QUESTIONS INVOLVED

Does the decision of the Wisconsin Court of Appeals, District III, as reported in *Fox v. General Telephone Company of Wisconsin,* 85 Wis. 2d 698, 271 NW 2d 161 (1978) decide a federal question of substance not theretofore determined by this Court; or has the Wisconsin Court decided it in a way probably not in accord with applicable decisions of this Court?

CLARIFICATION OF STATEMENT OF THE CASE

There are forty-two Petitioners in the instant action. All are employed by the Respondent General Telephone Company of Wisconsin (GTW) in various capacities, i.e. Installer-Repairman, Cable Splicer, CO&E Installer or Lineman. All are represented by the Communications Workers of America (CWA), a labor union; and all were employed by the Respondent at the times in question pursuant to the terms of a collective bargaining agreement, dated January 27, 1974 (Petitioners' Exhibit 45) entered into by and between GTW and CWA.

Prior to January 27, 1974, the payment for travel time was governed by the provisions of the GTW-CWA Agreement, dated March 9, 1973. (Petitioners' Exhibit 46, Article III, set forth at Petitioners' Brief at pp. 6-7) The 1973 Agreement provided that GTW employees would be paid for their "... travel time from the designated reporting center to the job and travel time returning to the designated reporting center." Under the 1973 Agreement, Petitioners would leave their designated reporting centers, e.g. Wausau, at the commencement of their working day on Monday and travel to the outlying job site; and at the end of the workweek, Petitioners would leave the job site on Friday so as to return to the designated reporting center at the close of their workday at 4:30 or 5:00 o'clock p.m. (R. 427) Petitioners were paid for such travel time.

The 1973 Agreement treated travel time to Company schools differently than travel to and from job sites. The Agreement provided that employees traveling to Company schools "... will

travel on Company time for the initial trip to the school and the last trip from the school." (Section 4 of Article III, Petitioners' Exhibit 46 at p. 70; Petitioners' Brief at p. 7) If a GTW employee attended a Company school for more than one week in duration, the employee would be paid for his travel time for the initial trip to the school and the last trip home from the school. However, he would not be paid for travel time on the interim weekend. (R. 3)

An interim weekend occurs when the employee works at a particular job site or attends a school for more than one week, i.e. when the employee leaves the job site or school on Friday and knows he is to return to the same job site or school on the following Monday. (R. 2)

Effective January 27, 1974, GTW and the CWA entered into a new labor agreement. With respect to the payment of travel time, Section 4 of Article III of the 1973 Agreement was changed to provide:

> Sec. 4. Employees traveling to Company schools or *a job site* within the operating area of the Company will travel on Company time for the *initial* trip to the school or *job site* and the *last* trip from the school or *job site. Transporatation will be provided by the Company ... Employees will travel on their own time and expense.*
>
> (Exhibit 45, Article III at p. 75; Petitioners' Brief at p. 7; Emphasis supplied.) Sections 1, 2 and 3 of Article III of the 1974 Agreement are identical to Sections 1, 2 and 3 of the 1973 Agreement. Only Section 4 was revised.

Mr. Gerald Kolb, GTW Personnel Director, was involved in the 1974 GTW-CWA contract

negotiations, and prepared the revised Section 4 of the travel time Article which was adopted by GTW and the CWA (R. 114) Revised Section 4 was adopted only after two prior proposals had been submitted to the CWA; but there was no agreement as to those proposals. (Exhibit 48, R. 434 to 439). Mr. Gerald Steffan, President of CWA Local 5572, went to Madison, Wisconsin, during the GTW-CWA negotiations in January of 1974, and prior to the time the revised Section 4 was discussed with the employees and prior to ratification of the 1974 Agreement (R. 449, 455 and 452). Mr. Steffan had a copy of the revised Section 4 prior to its ratification by the union membership (R. 450-451); and attended two meetings with the union membership to discuss and explain contract changes prior to ratification (R. 451, 453 and 454). GTW distributed a memorandum of all contract changes to the employees (R. 442-443). The 1974 Agreement was ratified by the employees in February of 1974. (R. 448).

After the 1974 Agreement took effect, GTW paid all employees for travel time on the initial trip to the distant job site and for the last trip from the job site; but only furnished transportation for the trips between the job site and designated reporting center on interim weekends. (R. 75, 427, 428, 440, 441, and 518). However, where an employee returned to the reporting center on Friday to report to a *new* job location the following Monday or to go on *vacation* the following Monday, he would be paid travel time for the return on Friday and the trip out again on Monday (R. 105). Where an employee was *directed* by management to return a vehicle to the reporting center to provide special equipment for another job site, he was paid travel time (R. 501, 506 and 507). If it should happen that

an employee was involved in an accident on an interim weekend trip, he would be paid wages for that period of time that he had responsibilities to do certain things with respect to the accident. (R. 502).

The truck used by the employee on the initial trip to the remote job site usually contained special equipment needed to perform the work at the job site (R. 73 and 75). This was usually the same transportation furnished to the employee to return on interim weekends, but not always (R. 75). Sometimes an employee would drive a line truck up but bring back a van on interim weekends (R. 364). When an employee utilized a truck or other vehicle to return to the home area on interim weekends, he was required to follow all Company safety rules in the operation of the vehicle, was required to park or leave the truck at the designated reporting center, and was required to return it to the job site the following Monday morning (R. 498, 515, 76, 77, 81 and 82). The safety rules required the employees "... to observe all rules of the road ... and to place safety cones in the front and rear of the vehicle whenever it was parked on a public street." (Respondent's Exhibit L-4, General Instruction No. 2, Sections 1.06 and 4.03). Further, the truck was required to be returned to the designated reporting center, and all tools and equipment were to remain with the trucks at all times for security reasons (R. 498).

Warren Phillips, GTW Fleet Coordinator, was the supervisor of the Company garage in Wausau; and he was responsible for a crew of mechanics and garage men who repaired and maintained all Company trucks. (R. 480). The garage facility in Wausau was not operated or staffed on Saturday or

Sunday of each week. (R. 483). During those days no Company trucks are repaired, restocked, equipped, washed or even gassed. (R. 483-485). The trucks simply remain where they have been parked. The only time the trucks were gassed would be on Friday, prior to the time the last garageman ended his shift at 9:00 p.m., or early on Monday when the garageman started his shift. (R. 485). The trucks would be gassed *only* if the employee-driver requested that the truck be gassed by turning down the gas tag on the truck visor. (R. 485). Also, each of the Petitioners are issued a Company credit card which is to be used by them to pay for the gassing and the repairing of GTW trucks. (R. 445).

It was not necessary that an employee return to his home area on the interim weekend and, in fact, there were times when he would remain at the remote site over the interim weekend. (R. 103). While GTW provided the employee with a vehicle to drive on interim weekends, no employee was required to return to his home base. He had other options available to him. (R. 440, 431, 432 and 433). If the job site was more than three hours away from the employee's reporting center, the employee could: (1) elect to receive a board and lodging allowance and stay over the weekend at the job site; (2) if the employee had been using his own personal vehicle to commute, he could return to the reporting center and receive a per diem travel allowance; or (3) elect to use a Company vehicle to return to the reporting center and travel on his own time. (R. 372; R. 17). If the job site was less than three hours away from the reporting center (and it is conceded by the parties that all of the trips in question fall within this classification), the employee could: (1) elect to stay over the weekend at the job site, but at his own expense; (2) if the

employee had been commuting in his own personal vehicle, he could simply return to the reporting center on his own time and expense; or (3) elect to use a Company vehicle to return to the reporting center and travel on his own time. (R. 17). All of the Petitioners elected to use a Company vehicle for travel on interim weekends.

On occasion a truck would be resupplied while at the home site over the interim weekend (R. 545); but, if the employee was directed by management to take equipment to a remote location, he was paid travel time (R. 506). Normally supply units brought supplies to drop points in the work area during the week (R. 52). Petitioners assert that they "routinely" picked up supplies in a "plastic bag" on the weekend to return it to the job site. (Petitioners' Brief at p. 10). However, the record indicates that only one of the forty-two Petitioners ever picked up supplies in a plastic bag, and that he did not specify on which interim weekend this occurred. (R. 545).

Based upon the evidence presented, the Wisconsin Trial Court (Circuit Court for Marathon County) held that the language of Article III of the 1974 Agreement did not entitle Petitioners to compensation for travel time on interim weekends; and that such travel in GTW vehicles was for the "convenience" of the Petitioners. A copy of the Trial Court's decision is set forth in the Respondent's Appendix to this Brief.

ARGUMENT

In support of their request that this Court review the decision of the Wisconsin Court of Appeals, District III, Petitioners argue that the decision is contrary to the provisions of the Fair Labor Standards Act (29 USCS §207 and §216); and

that the decision is contrary to the express contractual provisions contained in the GTW-CWA Agreement of January 27, 1974. Under 28 USCS §1257 (3), a final judgment of the highest state court may be reviewed "... where any title, right, privilege or immunity is ... claimed under the ... statutes of ... the United States." Not just any claim of right is reviewable on certiorari. Rather, a federal question of substance must be presented. See Rule 19, United States Supreme Court; and *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 US 70, 99 L.Ed. 897, 75 S.Ct. 614 (1955). Since the judicial construction of Article III, Sections 1 and 4 of the GTW-CWA 1974 Agreement in and of itself does not involve a federal question, the concern is whether or not a federal question of substance is presented under the FLSA in this Petition for Writ of Certiorari.

I. The Wisconsin Decision Is In Accordance With 29 USCS §254 (a) And Applicable Decisions Of This Court, And Other Federal Courts.

A. Only travel time which is a necessary and indispensable part of an employee's principal activity or activities which the employee is employed to perform, is compensable under 29 USCS §254 (a).

The FLSA requires time and one-half for work over forty hours per week with certain activities being excluded. One such exclusion is found in the Portal-to-Portal Act of 1947 which provides in relevant part:

29 USCS §254 (a) Except as provided in subsection (b) of this section, no employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, ... on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947 —

(1) walking, riding, or *traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and*

(2) Activities which are preliminary to or postliminary to said principal activity or activities,

which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

The FLSA is the sole guide as to the compensability of an incidental activity, regardless of its nature, if it occurs during the workday proper *or if it is integrated with the principal duties and occurs before or after the principal duties are performed.* See 29 CFR, Sec. 790.5 to 790.8. The Portal Act makes nonintegrated activities occurring before or after the workday noncompensable, unless compensation is required by contract, custom or practice.

Turning to the question of whether or not travel time is working time under the FLSA, the principles which apply in determining working time depend on the *kind of travel* involved. 29 CFR,

Sec. 785.33. The following provisions from 29 CFR relate to the instant controversy:

Section 785.38. Travel that is all in the day's work. Time spent by an employee in travel *as part of his principal activity,* such as travel from job site to job site *during the workday,* must be counted as hours worked.

Section 785.41. Work performed while traveling. Any work which an employee *is required to perform while traveling must* of course be counted as hours worked. An employee who drives a truck, bus, automobile, boat or airplane, or an employee who is required to ride therein as an assistant or helper, is working while riding, except during bona fide meal periods or when he is permitted to sleep in adequate facilities furnished by the employer.

(Emphasis supplied).

Time spent in travel as part of an employee's "principal activity" is compensable time, regardless of when it occurs. As to the principal activities themselves, the test of compensability is that as laid down by this Court — that the term "principal activity or activities" embraces all activities which "... are an *integral* and *indispensable* part ..." of a principal activity. *Steiner v. Mitchell,* 350 US 247, 100 L.Ed. 267, 76 S.Ct. 330, 335 (1956); Emphasis supplied.

In accordance with this Court's decision, the Federal Wage-Hour Administrator has defined "principal activities" in 29 CFR as follows:

Section 790.8. "Principal" Activities ... (a) ... *The "principal" activities referred to in the statute are activities which the employee is "employed to perform";* they do not include noncompensable "walking, riding, or traveling" of the type referred to in section 4 of the Act....

***

(b) *The term "principal activities" includes all activities which are an integral part of a principal activity....*

***

(c) *Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to its performance....*

(Emphasis supplied).

The above established the legal context in which the following question was presented for resolution before the Circuit Court for Marathon County, Wisconsin (the Trial Court) and on appeal to the Wisconsin Court of Appeals, District III:

> Was the Appellants' travel time on interim weekends a part of their principal activity, that is, a necessary and indispensable part of a principal activity, which the Appellants were employed to perform?

The resolution of this question, by necessity, depends upon the facts and circumstances of each particular case. *Steiner v. Mitchell,* 350 US 247, 100 L.Ed. 267, 76 S.Ct. 330, 335 (1956); *DA & S Oil Well Servicing, Inc. v. Mitchell,* 262 F2d 552, 554-55 (10th Cir. 1958); and 29 CFR Sec. 785.33. The Wisconsin Trial Court found that the Petitioners' travel time on interim weekends was not a necessary and indispensable part of the activity

the Petitioners were employed to perform, and that such travel in GTW vehicles was for the "convenience" of the Petitioners. (A-R.p. 107). Findings of Fact must be sustained unless they are *clearly erroneous* and *contrary* to the *great weight* and *clear preponderance* of the evidence. *Stevens Const. Corp. v. Carolina Corp.*, 63 Wis. 2d 342, 217 NW2d 291 (1974) and *Anderson v. Federal Cartridge Corp.*, 156 F2d 681, 684 (8th Cir. 1946).

B. The Wisconsin decision correctly held that the petitioners performed no work of consequence for GTW while engaged in traveling.

Petitioners argue that the decision of the Wisconsin Appellate Court is contrary to the principles of law enunciated in the cases of *Smith v. Superior Casey Crews*, 299 F. Supp. 725 (E.D. La. 1969), *Secretary of Labor, U.S. Dept. of Labor v. E.R. Field, Inc.*, 495 F2d 749 (1st Cir. 1974), and *Dunlop v. City Electric, Inc.*, 257 F2d 294 (5th Cir. 1976).

The *Smith* case, supra, did not involve any application of the Portal-to-Portal Act to travel time inasmuch as the Court found that the employer and employees "... had agreed that the employees were to be paid ..." for their travel time. Id at p. 731. Under 29 USCS §254 (b), travel time to and from the actual place of performance of the principal activity or activities which an employee is employed to perform, is not compensable under the FLSA, unless there is a custom, contract or practice in effect between the parties which requires such payment. 29 USCS §254 (a) and (b). Therefore, the question of whether or not the

plaintiffs' travel time was a necessary and indispensable part of their job activities was never reached in *Smith* because there was an agreement requiring compensation. Neverthless, the Petitioners cite the *Smith* case for the proposition that whenever an employee is under the supervision or control of an employer, compensation is required regardless of the activity engaged in. However, the case does not stand for that proposition. In *Smith,* the employer deducted from compensated hours at the job site, an amount equal to sleeping and lunch time on the theory that there was an implied agreement with his employees permitting this. The Court, in reviewing the evidence, found no such agreement, either express or implied. Specifically, the employees were "... completely under (the employer's) direction whenever they were on the job site..." even when they were sleeping or eating. Id at p. 730. This fact was inconsistent with the assertion by the employer that there was an agreement permitting such deductions.

Petitioners also rely on *Dunlop v. City Electric, Inc.*, supra, in support of the proposition that whenever an employer receives *any* benefit from any activity or activities of an employee (regardless of whether or not the activities are a necessary and indispensable part of a principal activity which they were employed to perform), the employee is nevertheless entitled to compensation for his time. In *Dunlop,* supra, the Circuit Court was confronted with the following factual situation: Employees arrived for work approximately twenty to fifteen minutes prior to the beginning of their workday at 8:00 a.m. During this pre-8:00 a.m. period, the employees filled out daily time sheets and material requisition sheets; loaded and unloaded trucks with

materials needed at the job site; and fueled the trucks. The Secretary of Labor argued that the pre-8:00 a.m. time spent by the employees was compensable under the FLSA; and the employer denied liability relying on the Portal-to-Portal Act. The District Court found for the employer and the Secretary appealed. On appeal, the Circuit Court discussed the provision of the Portal-to-Portal Act applicable to the case at bar:

> By enacting §4 (a) (2) of the Portal-to-Portal Act, Congress relieved employers from back wage liability under the F.L.S.A. for time spent by their employees in "activities which are preliminary to ... [their] principal activity or activities" and which occur "prior to the time on any particular workday at which [the] employee commences ... such principal activity of activities." The use of the phrase "activity or activities" was not inadvertent. The legislative history and the administrative interpretations of the Portal-to-Portal Act support the view that the phrase "activity or activities" was used to dispel the notion that any activities not inextricably tied to a single predominant principal activity could be considered non-compensable.
>
> * * *
>
> *This directive to construe liberally the terms "principal activity or activities" to encompass "any work of consequence"* was reiterated by the President in his Message to Congress on Approval of the Portal-to-Portal Act *and has been followed by the majority of courts interpreting the two statutes ...*

> *... The exemption was not intended to relieve employers from liability for "any work of consequence performed for an employer" (Secretary of Labor v. E.R. Field, Inc.,* 1 Cir. 1974, 495 F. 2d 749, 751), *from which the company derives "significant benefit". Cherup v. Pittsburgh Plate Glass Company,* N.D. W.Va., 1972, 350 F.Supp. 386, 391, aff'd mem., 4 Cir. 1973, 480 F. 2d 921, cert. denied, 1973, 414 U.S. 1068, 94 S.Ct. 578, 38 L.Ed. 2d 474. Nor was the exemption to apply to work "performed ... before or after the regular work shift ... [as] an integral and indispensable part of the principal activities for which covered workmen are employed." *Steiner v. Mitchell,* 1956, 350 U.S. 247, 256, 76 S.Ct. 330, 335, 100 L.Ed. 267, 273.
>
> 527 F. 2d 394, 397-398.
> (Emphasis supplied)

Simply, the Portal Act does not cover "any work of consequence performed for an employer." 29 CFR §790.8 (a). See *Mitchell v. King Packing Co.,* 350 US 260, 76 S.Ct. 337, 100 L.Ed. 282 (1956) and *Secretary of Labor, U.S. Dept. of Labor v. E.R. Field, Inc.,* supra. Therefore, the correct test is *not* whether the employer receives a benefit; but whether or not work of consequence was performed for the employer.

In this regard, the Wisconsin Court of Appeals noted:

> ... However, employer benefit, not requiring any employee time, would not under *Dunlop* make the preceding travel time compensable. *Benefit to the company, therefore, is not the sole consideration in determining compensability. To be compensable, the test is whether there*

was "work of consequence" performed "for the employer."

In this case the only work which conceivably was of consequence and performed for the employer was the transportation of the trucks from one location to another. The amount of time consumed in performing any of the other tasks such as removing waste from the trucks is not established in the record. However, it is clear that such time would be *de minimis* and would not qualify as work of consequence. *Regarding the transportation of the trucks, the trial court found this to be of no benefit to the company. This finding was based on the fact the trucks and equipment would have remained at the job site following the initial trip had they not been used for the sole convenience of the employees in traveling back and forth. Additionally, the employees were not required to drive the trucks and could elect to travel in their personal vehicles.* The trial court further found that the driving of the trucks was not motivated by any company purpose except the fulfillment of the company provided travel requirement in the collective bargaining agreement.

The driving of the trucks was therefore not an integral part of or indispensable to the principal activity or activities of the employees. These findings are not clearly erroneous and against the great weight and clear preponderance of the evidence...

Fox v. General Telephone Co.
85 Wis. 2d 698, 704 (1978)

The decision of the Wisconsin Court of Appeals is clearly in accordance with the legal principles established by previous decisions of this Court, as well as other federal courts, construing the FLSA and the Portal-to-Portal Act. At no time has there been a dispute as to the legal principles involved in this action. Rather, there has been a substantial factual dispute. However, this factual dispute has been resolved by the trier of facts. The reason the Petitioners have not prevailed in this action is simply that they have not met their burden of proof on the factual issues.

II. Section 4 Of The 1974 Agreement Provides That Travel Time On Interim Weekends Is Not Compensable, Thereby Rendering 29 USCS §254 (b) Inapplicable.

Under the Portal Act, an activity not otherwise compensable under the FLSA, is compensable if the employer has an agreement, custom or practice to that effect. 29 USCS §254 (b). Petitioners argue that the Wisconsin decision is contrary to the express provisions of Section 1 of Article III of the 1974 Agreement between GTW and the CWA. However, this argument does not involve a "federal question," but rather a question of judicial construction of a contract. In response to this same argument, the Wisconsin Court examined the provisions of Sections 1 and 4 of the Agreement (set forth on pages 6-7 of Petitioners' Brief); and noted;

> Plaintiffs argue they should be paid for interim weekend travel time under Sec. 1 regardless of Sec. 4. They claim the agreement is ambiguous and subject to the interpretation

that it left the previous travel time agreement unchanged. They also argue it would be a "subterfuge" to use Sec. 4 to exclude payment because the employees did not understand what the agreement said and thought they would be paid for interim weekend travel time. This argument incorrectly assumes that there is some duty on the employer to make sure the employees, represented by CWA, understood what the agreement meant.

We find that Sec. 4 specifically changed the former agreement in plain and unambiguous terms. It is our duty to construe the agreement as it stands giving effect to the plain meaning of the language used. The change in Sec. 4 of the 1974 agreement provides employees will travel on their own time. Travel time to and from job sites on interim weekends is therefore not compensable under the collective bargaining agreement. As to the "subterfuge" charge, the trial court found plaintiffs had not met the burden of proof necessary to estop the company from using Sec. 4 to deny travel time payments. This finding is not clearly erroneous and contrary to the great weight and clear preponderance of the evidence and therefore must be sustained on appeal.

Fox v. General Telephone Co.,
85 Wis. 2d 698, 700-701 (1978)

Petitioners assert that GTW had "the absolute duty" to provide clarifying terminology to more accurately describe Section 4 of the Agreement when GTW proposed to revise Section 4 during the course of the contract negotiations with the CWA. (Petitioners' Brief at page 15). No citation is given for this proposition; and such an assertion is

without any factual foundation. First, it assumes that the language contained in Section 4 is ambiguous, thereby requiring clarification. As the Wisconsin Court found, the language is clear and unambiguous, and expressly provides that travel time on interim weekends is not compensable. Secondly, to say that GTW had an obligation to provide clarifying terminology with respect to Section 4 evinces a lack of knowledge of the collective bargaining process. GTW negotiated the revisions to Section 4 in January of 1974 with the Bargaining Committee of the CWA as part of the negotiations for an overall labor-management agreement. GTW did not negotiate individually with the forty-two Petitioners, but with the exclusive bargaining representative of the Petitioners, i.e., the CWA. Indeed, to have negotiated directly with the Petitioners on this matter would have been an unfair labor practice under the National Labor Relations Act. If Petitioners were unclear as to the meaning of Section 4, it was *their sole responsibility* to seek proper clarification from their exclusive bargaining representative, the CWA, prior to the ratification of the 1974 Agreement.

III. The Petitioners Have Failed To Establish Any Factual Basis That They Performed Work Of Consequence To GTW In The Capacity Of Chauffers.

Finally, Petitioners assert that the word "transportation" as used in Section 4 of Article III of the 1974 Agreement is not equated with the word "vehicle". Rather, Petitioners argue that GTW must not only provide a vehicle, but a driver to transport the Petitioners on interim weekends. Consequently,

it is argued that Petitioners were performing services as a "chauffer". (Petitioners' Brief at page 16.) First, the foundation of the Petitioners' claim is that the travel time in question is travel time as a *driver,* rather than a passenger. As a result, the issue is *only* with respect to the *driving* time. Second, the 1974 Agreement provides only that GTW will provide transportation. It does not state that GTW will provide a *vehicle* and a *driver* to transport employees to the reporting centers on interim weekends. GTW's sole obligation was to provide a means of transportation for the employees to use on their own *if* they elected to return to the reporting centers. Nothing more was required. Third, the evidence does not indicate that Petitioners performed services as a "chauffer". There is *not* one shred of evidence in the entire record that passengers ever accompanied the Petitioner drivers on any of the interim weekend trips involved in this lawsuit. The record indicates that the Petitioners drove certain interim weekend trips; but the record is completely and totally *silent* as to whether or not there were passengers in the truck on those trips. In response to Petitioners' contention on this issue, the Wisconsin Trial Court noted:

> While not within the stipulated issues, Plaintiffs' Counsel has also raised the contention that the transportation required under section 4 is not a vehicle but rather a service, and the driver is, therefore, entitled to compensation. The complaint and the proof make it abundantly clear that each of the numerous Plaintiffs is assigned a company truck. *There is no evidence* that any such truck ever became a bus carrying passengers specifically ...
>
> (A-R.p. 108; Emphasis Supplied)

CONCLUSION

No unique or substantial question of federal law is present in this Petition for Certiorari. Rather, any question that was present in this action was a factual one. Simply, Petitioners have not established a factual record in this action to support a finding that their travel time on interim weekends constitutes compensable time, not exempted by the Portal-to-Portal Act. For the foregoing reasons, it is requested that this Court deny the Petition For Writ of Certiorari.

Respectfully submitted,

James C. Herrick
BRYNELSON, HERRICK,
GEHL & BUCAIDA
122 West Washington Avenue
Post Office Box 1767
Madison, Wisconsin 53701

(Admitted to practice before this Court on October 16, 1978)

RESPONDENT'S APPENDIX
(Pertinent Parts Only)

1 DECISION OF THE CIRCUIT COURT FOR MARATHON COUNTY, WISCONSIN

This case was tried to the Court early in May, 1977, and the final brief was submitted toward the end of June. By order, dated February 12, 1977, entered on stipulation, the issues were specified as two: one, whether Plaintiffs' travel time on interim weekends was compensable under Fair Labor Standards Act (FLSA), under 29 U.S.C.A. 254 (b); and two, is the Plaintiffs' driving of Defendant's trucks on interim weekends between their designated headquarters and a job site located in another exchange area, productive work time under the agreement in force between Defendant and its employees.

This action is brought by a substantial number of employees of the Defendant seeking to recover pay for travel time after January 24, 1974. Both before and after that date the Plaintiffs were employed by the Defendant under working conditions agreed to between Defendant and Communication Workers of America (CWA). Prior to that date the Plaintiffs left Wausau at the commencement of their working day on Monday and travelled to the job site and at the end of the week left the job site so as to return to the Wausau
2 headquarters at the close of their work day at 4:30 or 5:00 o'clock. So in effect, they were paid for their travel to and from the job. After the new contract the Defendant required the employees on interim weekends to leave the job site at the regular close of work and to commence work on Monday at the job site at the regular beginning of work, and the

effect of this was that the employees had to travel on their own time without compensation. An interim weekend occurs when the employee works at a particular job site more than one week, i.e., when the employee leaves work on Friday and knows he is to return to the same job site on the following Monday.

The agreement, Exhibit 45, calls for grievance and arbitration procedures, however, this is not an action invoking either of those remedies nor is CWA involved as a party.

The parties agree that Article III, set forth on Pages 74 and 75 of the 1974 Agreement, covers the determination of travel time. The Plaintiff stressed the provisions of Section 1 as supporting their claim while the company stresses Section 4. Under the old contract, Article III provided as follows:

"TRAVEL TIME: Sec. 1. Time worked shall be considered to include travel time from the designated reporting center to the job and travel time returning to the designated reporting center.

"Sec. 2: When an employee travels from one job location to another in a conveyance supplied by the Company, such travel time will be considered to be the same as productive work time.

"Sec. 3: When an employee travels from one job location to another on a public conveyance, travel time outside of the normal scheduled hours generally will not be paid for; however, the Company will pay certain board and lodging expense incurred by the employee during such travel time.

"Sec. 4: Employees traveling to Company schools within the operating area of the Company will travel on Company time for the initial trip to the school and the last trip from the school."

3 It is conceded that the practice under the old contract was to pay employees for their driving time from the job site to the Wausau headquarters back and forth each week without regard to whether it was the final week or an interim weekend. It is also conceded that under the old contract employees were not paid for their travel time on interim weekends when they were attending school for more than one week.

The only change in the new contract related to Section 4, which in 1974 was changed to read as follows:

"Sec. 4: Employees traveling to Company schools or a job site within the operating area of the Company will travel on Company time for the initial trip to the school or job site and the last trip from the school or job site. Transportation will be provided by the Company for the interim weekend(s) unless the employee has elected the reimbursement option provided in Article XXIII, Section 1 (b). Employees will travel on their own time and expense."

Normally where there is a change — as in this case in Section 4 — and a later dispute as to the effect of the change, the Court would look with interest to the contention of each side as to what they claim was the intended change. The intended change as contended by the Defendant is quite clear, namely, that this placed interim weekends as

to job sites on the same basis as school attendance. So far as the Court can determine, the Plaintiffs take no position as to the intent of the parties to be accomplished by such change. Plaintiffs argue that Section 4 is not sufficient to change the rule as to interim weekends because of the plain provision of Section 1, and in any event, that the Defendant was involved in bad faith, had the duty to make sure that the employees understood the change, and not having done so, should be barred from enforcing Section 4.

The Court would apprehend that during a period of such bargaining an employer is under rather stringent limitations in its communication
4 with its employees and that the responsibility basically is upon CWA to explain and take up with the employees the terms of the agreement being negotiated. Apart from that, the Court finds that the Plaintiffs have not met their burden of establishing any such breach of duty on the part of the Defendant to invoke an estoppel as requested. The Court considers this a matter of interpreting the contract and the ordinary rules of interpretation apply. A change in Section 4 justifies the inference that it was not intended to leave the agreement as it was before, but rather to make some change. The general provision in Section 1 had, in the old contract, been limited by the language in Section 4 as to interim weekends relating to schooling. The addition of language pertaining to job sites in Section 4 in the new contract, can only be interpreted as meaning that the agreement intended the same interim weekend treatment for job sites as had been used for schooling. Plaintiffs construction of Section 1 requires interpreting Section 4 as useless or inexplicable.

Plaintiffs argue that the company position is inconsistent because if an accident happened the driver is placed on overtime. The only testimony in this regard from the Defendant was that in the event of an accident the driver would be paid for his time in assuming responsibility for the truck and presumably the accident investigation.

Plaintiffs also contend that in practical effect they were required to take the truck home on interim weekends because the option afforded them was financially unattractive. Options always involve a comparison between the advantages of two alternative courses of action. The options were afforded by the agreement negotiated by the Company and the CWA. Presumably the option would be less attractive as the distance became
5 greater, but this does not justify the Court in finding that there was no option.

The Court finds that the literal language of Article III in the new contract deprives the Plaintiffs of compensation for travel time on interim weekends.

This leaves the question of whether the Plaintiffs' travel time on interim weekends is compensable under the FLSA, it being conceded that if FLSA conflicts with Article III, that the Federal provision controlled. The briefs indicated that this issue requires consideration of whether the instant case comes under the exception as to "walking, riding, or traveling to and from the actual place of performance of principal activity or activities which such employee is employed to perform." The parties each stress Federal cases interpreting this particular provision which they contend support their respective positions. Plaintiffs contend that DA&S Oil Well Servicing vs.

Mitchell, 262 Fed. 2d, 552, is in point and supports Plaintiffs' position. Defendant cites Tanaka vs. Richard K. W. Tom, Inc., 299 Fed. Supp. 732, as in point and supportive of its position.

6 While the DA&S Oil Well Case did result in finding that the drivers were performing services essential to the principal activity, the Court feels that the holding in that case, as well as the Tanaka Case, enunciates principles which require the finding that the FLSA does not require the invalidation of Article III, and particularly Subsection 4. In the DA&S Oil Well case the Court said:

> "Under the circumstances of this case, if the trucks are used solely for the transportation of employees to and from their principal place of work, then we think the drivers are 'riding or traveling' within the exclusion of Section 4 of the Act. The employer is under no obligation to furnish such transportation and it is provided only for the convenience of the employees. No employee is designated to drive the pick-up. Each employee, including the driver, is free to take advantage of the convenience or to provide his own transportation. We hold that the driving of the trucks on which the units are mounted, and the driving of the pick-ups when used to transport necessary equipment, constitute activities which are an 'integral and indispensable' part of the principal activities of the employees during the driving, and such services are, therefore, compensable." Page 555.

Each case under the DA&S Oil Well Case must be decided upon its peculiar facts, and in that case the Court said, "It is true that driving a truck is a totally different type of activity from that performed by the driver employee at the well site."

The driving of the truck here is likewise a totally different activity from the work performed at the job site. Here the employee could elect to travel in his personal car, to stay at the job site area, or to require the company to furnish transportation. The fact that the transportation was in a truck which was loaded with equipment essential for the driver's work, was incidental. If the driver had elected a different option, the truck would have stayed at the job site ready for continuation of
7 work on Monday. The Court could not find that the return of the trucks to the Wausau garage was motivated by any company purpose except the fulfillment of the transportation requirement for the driver, and that the finding must be made that the principal purpose was the convenience of the employee in going back and forth. Reasonable rules made by the company relating to safety and security do not affect the conclusion that the driver is riding or traveling within the exclusion. Defendant's position was that if the driver were directed to bring a necessary piece of equipment on the following Monday, that he would be paid for the driving time, and this would be comparable to the holding in the DA&S Oil Well Case. But for our purposes, since we are dealing with no such transport of material but merely transportation of the driver employee each interim weekend, the DA&S Oil Well Case in effect holds that that is not covered, and this is likewise the holding of the Tanaka Case, 299 F. Supp. 732. The principal difference in the Tanaka Case is that the foreman driver was permitted to take the truck home rather than parking it over the weekend at a company garage.

The Court, as above indicated, feels that the facts in the DA&S Case and the Tanaka Case are close enough so that the principle in those cases (that where a truck was used primarily for transportation to and from their principal place of work, that it was provided for convenience of the employee) applies to the instant case. As in the Tanaka Case, the Plaintiffs were riding or traveling within the exclusion of the Portal to Portal Act.

While not within the stipulated issues, Plaintiffs' Counsel has also raised the contention that the transportation required under Section 4 is not a
8 vehicle but rather a service, and the driver is, therefore, entitled to compensation. The complaint and the proof make it abundantly clear that each of the numerous Plaintiffs is assigned a company truck. There is no evidence that any such truck ever became a bus carrying passengers specifically, although there was testimony by some of the Plaintiffs that they were not certain as to certain trips whether they drove or were a passenger in connection with adjusting their claim to demand compensation only as drivers. There is nothing in the history, nor in the wording of Article III which the Court finds to support the conclusion that Defendant, to comply with the requirement of transportation, must provide both a vehicle and a driver. The pattern was for each employee to have a vehicle assigned to him, and to hold as Plaintiffs contend in this respect, would make a nullity of the final sentence in Section 4. The Defendant is entitled to dismissal of the Complaint. Defendant may submit Findings of Fact, Conclusions of Law, to the Court, sending a copy to Plaintiffs' Counsel. The Court will withhold action on the proposed Findings for a period of five days after receipt to enable Plaintiffs' Counsel to submit any objections.